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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 50

UNITED STATES OF AMERICA,
Petitioner,

v.

DANIEL ANDREW SEEGER,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

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IN THE

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OCTOBER TERM, 1963

No. 936

UNITED STATES OF AMERICA,

Petitioner

v.

DANIEL ANDREW SEEGER,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

This brief is submitted in response to the petition of the United States for a writ of certiorari to review the judgment, dated January 20, 1964, of the United States Court of Appeals, Second Circuit (Pet. App. C., p. 43) unanimously reversing the judgment (R. 4a-5a)* of the United States District Court for the Southern District of New York which had found respondent guilty, and convicted him,

* The reference "R" is to the Appendices attached to Seeger's appellant's brief and reply brief in the Court of Appeals; and the reference "GX" is to the Government's Exhibits.

of the offense of a registrant under the Universal Military Training and Service Act, unlawfully and knowingly failing, neglecting and refusing to perform a duty required of him under and in execution of said Act, and the rules, regulations and directives made pursuant thereto, to wit, to submit to induction at the time and place fixed in an Order to Report for Induction mailed to him by his Selective Service System Local Board (Title 50, App. §462, U. S. Code) and committing him to the custody of the Attorney General for imprisonment for a period of one year and one day.

Opinions Below

The opinions of the Court of Appeals and of the District Court, respectively, are annexed to the Petition (Pet. App. A., pp. 11-28 and App. B., pp. 29-41) and are officially reported at 326 F. 2d 846 and 216 F. Supp 516.

Jurisdiction

Petitioner's statement of jurisdiction is accepted.

Questions Presented

1. Is Section 6(j) of the Universal Military Training and Service Act (50 U.S.C.A., App. §456(j)), as amended by Congress in 1948 by the insertion of the "Supreme Being" provision, invalid, as in violation of the "Establishment of Religion" and "Free Exercise of Religion" clauses of the First Amendment of the United States Constitution and, also, of the "Due Process" clause of the Fifth Amendment thereof?

2. Whether, in granting an exemption from combatant training and service in the armed forces of the United

States to any person "who by reason of religious training and belief is opposed to participation in war in any form", Congress could, constitutionally, require as a condition of such exemption, that such person's religious training and belief must be a "belief in a relation to a Supreme Being involving duties superior to those arising from any human relation * * *"?

3. Was not the decision and judgment of the Court of Appeals herein correct, in reversing the judgment of the District Court and in deciding that Section 6(j) of the Universal Military Training and Service Act (50 U.S.C.A., App. §456(j)) violates the First and Fifth Amendments of the United States Constitution, that respondent was improperly convicted of violating said Act and that respondent is entitled to exemption as a concientious objector under Section 6(j) of said Act?

Statute Involved

The statute involved is Section 6(j) of the Universal Military Training and Service Act, 50 U.S.C.A., App. §456(j), as amended, which, so far as relevant, provides:

> "Nothing contained in this title [sections 451-454 and 455-471 of this Appendix] shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. *Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal code.* * * *" (Italics supplied.)

The above italicized portion of present Section 6(j) was first brought into the statute by the enactment of Section 6(j) of the 1948 Selective Service Act (62 Stat. 604, 612-13 (1948)), which amended the 1940 Selective Training and Service Act. (See Section 5(g) of the Selective Training and Service Act of 1940 (50 U.S.C.A. App. §305(g)); 54 Stat. 885 (1940).)

Statement of the Case

Petitioner's statement of the case (Pet. pp. 3-6) is not deemed adequate.

Respondent registered with his local draft board upon becoming 18 years old in September 1953. He was then a college student (GXs 1, 3). He did not then claim exemption as a conscientious objector, but asked deferment as a student (GXs 3, 4, 5, 6, 7). He was initially classified 1-A but later was reclassified 2-S.

By letter to said board dated July 12, 1957, he first claimed exemption as a conscientious objector (GX 11); and thereafter filled out and filed the requisite form (SSS Form No. 150; GXs 12, 13). Therein, (GX 13) he executed the "Series I—Claim for Exemption", as follows:

> "(B) I am, by reason of my 'religious' belief, conscientiously opposed to participation in war in any form and I am further conscientiously opposed to participation in noncombatant training and service in the Armed Forces. I, therefore, claim exemption from both "combatant and noncombatant training and service in the Armed Forces."

His answers to the questions in "Series II—Religious Training and Beliefs", were: As to question "1", "Do you believe in a Supreme Being?", defendant did not check the "Yes" or "No" boxes but added and checked a new, third box with the notation: "Please see attached sheet."

As to question "2", "Describe the nature of your belief which is the basis of your claim made in Series I above, and state whether or not your belief in a Supreme Being involves duties which to you are superior to those arising from any human relation", he answered: "Please see attached sheet".

In the attached sheets, in answer to question "1", concerning his belief in a Supreme Being, he stated in part:

> "Of course, the existence of God cannot be proven or disproven, and the essence of his nature cannot be determined. I prefer to admit this and leave the question open rather than answer 'yes' or 'no'.
>
> "However, skepticism or disbelief in the existence of God does not necessarily mean lack of faith in anything whatsoever."

In answer to question "3", "Explain how, when and from whom or from what source you received the training and acquired the belief which is the basis of your claim made in Series I above", he wrote: "Please see attached sheet". On the attached sheet he listed various of his readings, among others, those of religious writers, and publications of the American Friends Service Committee (a Quaker organization).

In answer to question "4", "Give the name and present address of the individual upon whom you rely most for religious guidance," he wrote: "Please see attached sheet." On the attached sheet he stated:

> "I rely on no particular person for religious guidance. I resolve spiritual and ethical problems by reading relevant essays or books, by discussion and debate with colleagues, and ultimately, by following the dictates of my conscience."

Thereafter, Seeger was reclassified as 1-A and ordered to report for a pre-induction physical examination (GX 17). Notwithstanding his personal appearance before it, the local board voted to continue his 1-A classification (GXs 18, 19), whereupon Seeger appealed to the Appeal Board, on the ground he was entitled to exemption as a conscientious objector (GXs 20, 21, 23, 24).

The Appeal Board forwarded his file to the Department of Justice for an advisory opinion (GX 26). The F.B.I. conducted an investigation of him, which resulted in a most favorable report (GX 27(a), (b), (c) and 30(b); R. pp. 16a-21a).

He then had a hearing before the Hearing Officer (GXs 27(a), (b), (c), (d), who, later, filed a report attesting to his complete sincerity and good faith and recommending that his appeal be sustained (GX 30(a); R. pp. 9a-12a). However, the Department of Justice reached an opposite conclusion and recommended that his claim as a conscientious objector be denied because it was not based upon a religious training and belief in relation to a Supreme Being (GX 30(a); R. pp. 8a-16a).

The Appeal Board then voted to classify him as 1-A (GXs 34, 35); as, later, did the Presidential Appeal Board (GXs 47, 48, 49, 50).

He was then ordered to report for induction (GX 51). He did so, but failed to submit to induction (GXs 52, 53a) claiming he had erroneously been denied exemption as a conscientious objector (GX 61).

Two years later he was indicted (R. pp. 6a-7a). He pleaded "not guilty", waived a jury trial and was tried before District Judge Levet who found him "guilty" and sentenced him to imprisonment for a year and a day (R. pp. 1a, 4a, 5a, 24a-37a; Pet. App. B, pp. 29-41). The District Court held that the statute, inherently and as

applied against Seeger, was constitutional under the First and Fifth Amendments of the United States Constitution.

The Court of Appeals reversed (Pet. App. A, pp. 11-28), holding the statute to be unconstitutional.

The petition (pp. 3-5, 9) fails to make it clear that Seeger's claim of exemption as a conscientious objector arose by reason of religious training and belief, albeit not a belief in a relation to a Supreme Being.

As the record below shows, Seeger was denied exemption as a conscientious objector solely because his religious training and belief was not the type of religious training and belief defined in the present statute, i.e., one related to a Supreme Being. Nowhere in the prior proceedings is there any finding or holding that Seeger's conscientious objection was based on political, sociological or philosophical views or merely a personal moral code, rather than a religious training and belief (cf. Pet. pp. 3-5, 9).

As pointed out by the Court of Appeals (Pet. App. A. p. 26):

> "With commendable candor, the Government has fully conceded that Seeger's views fall squarely within the definition of 'religion' announced for this Circuit in *Kauten*, and subsequently reaffirmed in *Phillips and Reel*."*

To the same effect, see statement at page 12 of Appendix A.

The decision of the District Court (Pet. App. B at p. 36) recognized and was predicated on the fact, proved by stipulation, "that the grounds on which defendant claimed exemption are religious and arise from religious training

* *United States* v. *Kauten*, 133 F. 2d 703 (2d Cir. 1943); *United States ex rel. Phillips* v. *Downer*, 135 F. 2d 521 (2d Cir. 1943); *United States ex rel. Reel* v. *Badt*, 141 F. 2d 845 (2d Cir. 1944).

and belief by reason of which defendant is conscientiously opposed to participation in war" and "fall within the definitions of religion as set forth in the following cases, determined by the Second Circuit Court of Appeals" (i.e. the *Kauten, Phillips* and *Reel* cases, *supra*).

The Government conceded, on the trial and in its trial brief (R. pp. 22a-23a, 1b-5b) that Seeger's belief on which he based his conscientious objection and claimed exemption is religious and arises from a religious training and belief, at least within the definition of "religion" set forth in the *Kauten, Phillips* and *Reel* cases, and that he would have been entitled to exemption under the religious training and belief provision of the 1940 Draft Act, as construed by the Second Circuit Court of Appeals in those cases.

Furthermore, the Hearing Officer recommended exemption on the ground that Seeger's "conscientious objections are based upon his individual training and belief, both of which include research in religious and cultural fields" (R. p. 12a).

Finally, the recommendation of the Department of Justice was, "based upon the facts contained herein", that "the registrant has failed to make a claim within the meaning of Section 6(j) of the Act, since his objections are not based upon religious training and belief in relation to Supreme Being, as defined in said Act" (R. p. 15a).

Thus, concededly, Seeger's conscientious objection is based upon a religious training and belief, though that religious training and belief is not related to an affirmative belief in a Supreme Being.

Discussion

1. It is respondent's position that the Court of Appeals' decision is manifestly correct, in reversing the judgment of conviction and in holding Section 6(j) unconstitutional,

and should be affirmed if a review is granted by this Court.

Section 6(j) is violative of both the "Establishment Clause" and the "Free Exercise Clause" of the First Amendment.

In enacting that law, Congress has created a preference and an aid in favor of conscientious objectors whose objection is related to or based upon a belief in a Supreme Being, as against those conscientious objectors whose objection is related to or based upon some other type of religious training or belief.

Thus, Congress has passed a law and imposed a requirement which aids those religions based on a belief in the existence of God as against those religions founded on different beliefs. It has preferred one type of religion over another. It has aided religions as against non-believers. It has abandoned the "neutral" position in which the "Establishment" and "Free Exercise" clauses of the First Amendment places our Government. It has, in effect, established an official, state religion—one which is related to a belief in a Supreme Being—and it has placed the support of Government behind this particular religious belief. It has established by legislative fiat the religious orthodoxy of the "Supreme Being" religious belief. It denies exemption to, and discriminates and penalizes, a person because of his kind of religious belief.

Such a law is clearly unconstitutional under the Establishment Clause of the First Amendment. *Torcaso* v. *Watkins*, 367 U. S. 488 (1961); *Everson* v. *Board of Education*, 330 U. S. 1 (1947); *Illinois ex rel. McCollum* v. *Board of Education*, 333 U. S. 203 (1948); *Abington School District* v. *Schempp*, 374 U. S. 203 (1963); *Engel* v. *Vitale*, 370 U. S. 421 (1962); *McGowan* v. *Maryland*, 366 U. S. 420 (1961).

Such a law also violates the Free Exercise Clause of the First Amendment. *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940); *United States* v. *Ballard*, 322 U. S. 78 (1944); *West Virginia Board of Education* v. *Barnette*, 319 U. S. 624 (1943); *Sherbert* v. *Verner*, 374 U. S. 398 (1963).

Even assuming that draft exemption is a matter of grace or privilege, Congress cannot constitutionally pass a law, such as this, which, itself, grants or denies the privilege of exemption on a ground which is discriminatorily unconstitutional. *Speiser* v. *Randall*, 357 U. S. 513 (1958); *Sherbert* v. *Verner*, 374 U. S. 398 (1963). Cf. *Washington Ethical Society* v. *District of Columbia*, 249 F. 2d 127 (1957); *Fellowship of Humanity* v. *County of Alameda*, 315 P. 2d 394 (1957).

Section 6(j), also, is violative of the "due process clause" of the Fifth Amendment, which embodies the concept of equal protection of the laws.

The classification set up in Section 6(j) is arbitrary and discriminatory in that it permits the exemption from military service of a person whose religious training and belief is related to a Supreme Being but denies such exemption to a person whose religious training and belief is not so related.

Such a classification not only violates the First Amendment but, also, constitutes a denial of equal protection of the laws and due process of law under the Fifth Amendment. *Bolling* v. *Sharpe*, 347 U. S. 497, 499 (1954). As the Court of Appeals stated: "A line such as is drawn by the 'Supreme Being' requirement between different forms of religious expression cannot be permitted to stand consistently with the due process clause of the Fifth Amendment." (Pet. App. A. p. 27).

2. Respondent, however, recognizes that this case is one of first impression in this Court; that it squarely

presents the constitutional issues; and that it involves important questions of federal statutory and constitutional law, including the powers of Congress in granting or denying exemptions under the draft act. Respondent also realizes that it is important that the present draft act be uniformly administered throughout the country and that conflicts presently exist in the Circuits regarding the interpretation and constitutionality of Section 6(j) thereof, particularly the "Supreme Being" clause.

The Selective Service and Training Act of 1940 granted an exemption to any person "who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form" (54 Stat. 885, 889).

The Court of Appeals, Second Circuit, in the *Kauten*, *Phillips* and *Reel* cases, *supra*, decided thereunder, defined and interpreted "religious belief" broadly and held it error to deny exemption to a conscientious objector because his religious belief was not related to a Deity or Supreme Being. A conflicting result was reached by the Ninth Circuit Court of Appeals in *Berman* v. *United States*, 156 F. 2d 377 (9 Cir., 1946), cert. den. 329 U. S. 795, wherein, by a divided court, it was held such "religious belief" meant a belief in relation to a Deity or God.

As noted above (pp. 3-4), the conscientious objection provision of the 1940 Act was revised in 1948 by the addition of the "Supreme Being" clause, under which a conscientious objector is granted exemption only if his religious training and belief constitutes a belief in a relation to a Supreme Being.

Thereafter, the constitutionality of this new "Supreme Being" provision, under the First Amendment, was upheld by the Ninth Circuit in *George* v. *United States*, 196 F. 2d

445 (9 Cir., 1952), cert. den. 344 U. S. 843; in *Clark* v. *United States*, 236 F. 2d 13 (9 Cir., 1956), cert. den. 352 U. S. 882; and in *Etcheverry* v. *United States*, 320 F. 2d 873 (9 Cir., 1963), cert. den. 344 U. S. 843; and, by the Third Circuit, in *United States* v. *DeLime*, 223 F. 2d 96 (3 Cir., 1955).

All of these cases, except *Etcheverry*, were decided prior to *Torcaso* v. *Watkins*, 367 U. S. 488 (1961) wherein this Court first spelled out clearly the constitutional principle that Congress could not pass laws or impose requirements which aid those religions based on a belief in the existence of God as against those religions founded on different beliefs. The *Torcaso* decision was ignored by the Ninth Circuit in *Etcheverry*, even though the rule of *Torcaso* had been restated in *Abington School District* v. *Schempp*, 374 U. S. 203, 220 (1963).

These conflicts should be resolved by this Court.

Conclusion

Although it is respondent's position that the decision herein of the Second Circuit Court of Appeals is correct and should be affirmed in any event, he recognizes that sound reasons exist in this case for the granting of the Government's petition for a writ of certiorari and, accordingly, he does not oppose such petition.

Respectfully submitted,

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